Supreme Court, U.S.
FILED
FEB 18 2003
CLERK

(10)

No. 02-479

In The

Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,
Petitioner,
v.
MICHAEL J. HASON,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, ET AL., *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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The American Association of People with Disabilities

The American Association on Mental Retardation

AARP

The American Council of the Blind

The American Diabetes Foundation

The American Network of Community Options and Resources

The American Occupational Therapy Association

The Anti-Defamation League

The Arc of the United States

The Association on Higher Education and Disability

The Bazelon Center for Mental Health Law

The Brain Injury Association of America

The Epilepsy Foundation®

Lambda Legal Defense and Education Fund, Inc.

The National Alliance For The Mentally Ill

The National Association for Rights Protection and Advocacy

The National Health Law Program

The National Mental Health Association

The National Senior Citizens Law Center

The National Spinal Cord Injury Association

The Polio Society

Self Help for Hard of Hearing People

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE CONSTITUTIONAL RIGHTS AT ISSUE IN TITLE II ARE SIGNIFICANTLY BROADER THAN THOSE IMPLICATED IN TITLE I 2

II. CONGRESS' SPECIFIC FINDINGS OF STATES' UNCONSTITUTIONAL DISCRIMINATION ARE CONFIRMED BY THE JUDICIAL RECORD 5

III. STATES HAVE HISTORICALLY DEPRIVED AMERICANS WITH DISABILITIES OF THEIR CONSTITUTIONAL RIGHTS 7

A. Patterns of Unconstitutional State Conduct Involving The Fundamental Right to Vote 7

1. States Disenfranchise People With Disabilities 8

2. States Deny Access To Voting Equipment and Polling Places 10

B. Patterns Of Unconstitutional State Interference With Equal And Effective Access To The Courts 10

1. States Exclude People With Disabilities From The Judicial Process As Litigants....10

2. States Exclude People With Disabilities From The Judicial Process As Jurors....13

C. Patterns Of Unconstitutional State Discrimination Against People With Disabilities In Licensing....15

D. Patterns of Unconstitutional State Discrimination In Education....15

E. Patterns Of State Interference With The Fundamental Right To Marry And Form Families....17

1. States Sterilize Persons With Disabilities....17

2. States Prohibit The Marriage of People With Disabilities....20

3. States Discriminate Against Parents With Disabilities....21

F. Pattern of Unconstitutional State Treatment Of People With Disabilities In Institutions....23

1. States Institutionalize People With Disabilities Without Necessity And Treat Them Deplorably While They Are In Civil Institutions....23

2. States Ignore The Medical Needs Of Prisoners With Disabilities And Otherwise Violate Their Constitutional Rights....27

G. Patterns Of Irrational State Segregation Of People With Disabilities From the Community....29

CONCLUSION....30

APPENDIX....1a

The *Amici* Organizations....1a

Non-current Statutes Cited In Brief As Examples of States Imposing Restrictions On Jury Service....9a

Non-current Statutes Cited In Brief As Examples Of States Excluding Students With Disabilities From Public Education....10a

Non-current Statutes Cited In Brief As Examples Of States Restricting Right To Marry And Form Families....10a

TABLE OF AUTHORITIES

CASES

In re A.W.,
637 P.2d 366 (Colo. 1981).....18, 19

Adoption of Richardson,
59 Cal. Rptr. 323 (Ct. App. 1967).....22

American Association of People With Disabilities v. Smith, 227 F. Supp. 2d 1276
(M.D. Fla. 2002).....10

Armstrong v. Davis,
275 F.3d 849 (9th Cir. 2001),
cert. denied, 123 S. Ct. 72 (2002).....12

Association for Retarded Citizens v. Olson,
561 F. Supp. 473 (N.D. 1982)
aff'd, 713 F.2d 1384 (8th Cir. 1983).....25

Baby Neal v. Casey,
821 F. Supp. 320 (E.D. Pa. 1993).....23

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995).....30

Batson v. Kentucky,
476 U.S. 79 (1986).....13

Bednarski v. Bednarski,
366 N.W.2d 69 (Mich. Ct. App. 1985).....22

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).....2, 3, 5

Boddie v. Connecticut,
401 U.S. 371 (1971).....11

Brown v. Board of Education,
347 U.S. 483 (1954).....15

Buck v. Bell,
274 U.S. 200 (1927).....18

Carey v. Population Service International,
431 U.S. 678 (1977).....17

Carter v. Jury Commission,
396 U.S. 320 (1970).....13

City of Boerne v. Flores,
521 U.S. 507 (1997).....3, 6

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985).....3, 4, 8, 20, 25, 29

Clark v. Cohen,
794 F.2d 79 (3d Cir. 1986) 26

Clark v. Jeter,
486 U.S. 456 (1988).....4

Clark v. Madden,
725 N.E.2d 100 (Ind. Ct. App. 2000) 22

Clarkson v. Coughlin,
898 F. Supp. 1019 (S.D.N.Y. 1995) 13

Coleman v. Wilson,
912 F. Supp. 1282 (E.D. Cal. 1995) 28, 29

Cook v. State,
495 P.2d 768 (Or. 1972) 18

Cruzan v. Director, Missouri Department of Health,
497 U.S. 261 (1990) 17

DeLong v. Brumbaugh,
703 F. Supp. 399 (W.D. Pa. 1989) 14

Doe v. Rowe,
156 F. Supp. 2d 35 (D. Me. 2001) 8, 9

Downs v. Sawtelle,
574 F.2d 1 (1st Cir. 1978) 19

Eisenstadt v. Baird,
405 U.S. 438 (1972) 17

Epicenter, Inc. v. City of Steubenville,
924 F. Supp. 845 (S.D. Ohio 1996) 30

Eric L. By and Through Schierberl v. Bird,
848 F. Supp. 303 (D.N.H. 1994) 26

Estelle v. Gamble,
429 U.S. 97 (1976) 27

Faretta v. California,
422 U.S. 806 (1975) 11

Galloway v. Superior Court,
816 F. Supp. 12 (D.D.C. 1993) 14

Gary W. v. State of Louisiana,
437 F. Supp. 1209 (E.D. La. 1976) 24

Gary W. v. State of Louisiana,
1990 U.S. Dist. LEXIS 1746
(E.D. La. Feb. 15, 1990) 24

Gregg v. Georgia,
428 U.S. 153 (1976) 27

H.J.B. v. P.W.,
628 So. 2d 753 (Ala. Civ. App. 1993) 22

Halderman v. Pennhurst State School & Hospital,
446 F. Supp. 1295 (E.D. Pa. 1977),
rev'd on other grounds, 451 U.S. 1 (1980) 25

Harper v. Virginia State Board of Elections,
383 U.S. 663 (1966) 7

Hill v. New York State Board of Elections,
503 N.Y.S.2d 958 (N.Y. Sup. Ct. 1986) 10

Honig v. Doe,
484 U.S. 305 (1988) 16

Jackson v. Fort Stanton Hospital & Training School,
757 F. Supp. 1243 (D.N.M. 1990),
rev'd in part on other grounds, 964 F.2d 980
(10th Cir. 1992) 26

Jackson v. State,
544 A.2d 291 (Me. 1988) 15

Kiman v. New Hampshire Department of Corrections, 301 F.3d 13, *vacated pending en banc rehearing*, 310 F.3d 785 (1st Cir. 2002) 28

Larkin v. Michigan,
883 F. Supp. 172 (E.D. Mich. 1994), *aff'd*,
89 F.3d 285 (6th Cir. 1996) 30

Lelsz v. Kavanagh,
673 F. Supp. 828 (N.D. Tex. 1987) 25

Logan v. Zimmeman Brush Co.,
455 U.S. 422 (1982) 11

Manhattan State Citizens Group Inc. v. Bass,
524 F. Supp. 1270 (S.D.N.Y. 1981) 9

In re Marriage of Carney,
598 P.2d 36 (Cal. 1979) 22

In re Marriage of R.R.,
575 S.W.2d 766 (Mo. Ct. App. 1978) 22

McKinney v. McKinney,
805 S.W.2d 66 (Ark. 1991) 18

Meyer v. Nebraska,
262 U.S. 390 (1923) 20

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 7

Mills v. Board of Education,
348 F. Supp. 866 (D.D.C. 1972) 16

Motes v Hall County Department of Family & Children Service, 306 S.E.2d 260 (Ga. 1983) 18

Moye v. Moye,
627 P.2d 799 (Idaho 1981) 23

National Organization on Disability v. Tartaglione, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), 2001 U.S. Dist. LEXIS 16932 (E.D. Pa. Oct. 22, 2001) 10

O'Connor v. Donaldson, 422 U.S. 563 (1975) 25

Panitch v. Wisconsin, 444 F. Supp. 320 (E.D. Wis. 1977) 16

Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) 27

Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) 16

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 27

People v. Rivera, 480 N.Y.S.2d 426 (N.Y. Sup. Ct. 1984) 12

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 3

Poe v. Lynchburg Training School & Hospital, 518 F. Supp. 789 (W.D. Va. 1981) 19

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir.), *cert. denied*, 123 S. Ct. 72 (2002) 4, 11, 12

Reno v. Flores, 507 U.S. 292 (1993) 4

Reynolds v. Sims,
377 U.S. 533 (1964).....7

Robinson v. Kansas,
117 F. Supp. 2d 1124 (D. Kan. 2000),
aff'd, 295 F.3d 1183 (10th Cir. 2002).....17

Ruiz v. Estelle,
503 F. Supp. 1265 (S.D. Tex. 1980),
aff'd, 679 F.2d 1115 (5th Cir. 1982).....28, 29

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).....15

Skinner v. Oklahoma,
316 U.S. 535 (1942).....20

Society for Good Will to Retarded Children v. Cuomo, 745 F. Supp. 879 (E.D.N.Y. 1990).....25

Stanley v. Illinois,
405 U.S. 645 (1972).....21

State v. Spivey,
700 S.W.2d 812 (Mo. 1985).....14

In re Sterilization of Moore,
221 S.E.2d 307 (N.C. 1976).....18

Stump v. Sparkman,
435 U.S. 349 (1978).....19

T.E.P. v. Leavitt,
840 F. Supp. 110 (D. Utah 1993).....21

Thomas S. v. Morrow,
781 F.2d 367 (4th Cir. 1986) 26

Tolbert v. McGriff,
434 F. Supp. 682 (M.D. Ala. 1977) 15

Troxel v. Granville,
530 U.S. 57 (2000).....21

Turner Broadcasting System v. FCC,
520 U.S. 180 (1997).....6

Weems v. United States,
217 U.S. 349 (1910).....27

Wisconsin v. Yoder,
406 U.S. 205 (1972).....21

In re Wiseman's Appeal,
32 Pa. D. & C. 3d 294, 1983 Pa. D. & C. LEXIS
69 (C.P. 1983).....15

Wyatt v. Rogers,
985 F. Supp. 1356 (M.D. Ala. 1997).....24

Wyatt v. Stickney,
344 F. Supp. 387 (M.D. Ala. 1972),
aff'd, 503 F.2d 1305 (5th Cir. 1974)..... 24-25

Yarbaugh v. Roach,
736 F. Supp. 318 (D.D.C. 1990).....29

Youngberg v. Romeo,
457 U.S. 307 (1982).....23

Zablocki v. Redhail,
434 U.S. 374 (1978).....20

STATUTES

20 U.S.C. § 1400(b).....16

42 U.S.C. § 12101(a).....4, 5, 6, 7, 17, 23

42 U.S.C. § 12101(b).....4

42 U.S.C. § 12131 3

42 U.S.C. § 12132 .....3, 6

ALA. CODE § 12-16-60 (1995).....14

ALASKA CONST. art. 5, § 2 (2000) 8

ARK. CODE ANN. § 16-31-102 (1987),
amended, 1994 Ark. Acts No. 4, § 6 (1994).....14

ARK. CONST. AMEND. 51, § 11(a)(6)(2001) 8

ARK. CONST. art. 3, § 5 (1987) 8

CAL. CIV. CODE § 4201 (1987).....20

CONN. GEN. STAT. § 8-3f (2001) 30

D.C. CODE ANN. § 30-103 (1981) 20

D.C. CODE ANN. § 46-403 (2001) 21

DEL. CODE ANN. tit. 15, § 1701 (1999) 8

DEL. CODE ANN. tit. 22, § 309 (2002) 30

DEL. CONST. art. 5, § 2 (Supp. 2000) 8

DEL. CONST. art. 10, § 1 (1975) 16

HAW. CONST. art. 2, § 2 (1997) 8

IND. CODE § 22-1601 (1950) 19

IOWA CODE ANN. § 595.3 (1990) 20

IOWA CONST. art. 2, § 5 (2000) 8

KAN. CONST. art. 5, § 2 (1988) 8

KY. CONST. § 145(3) (2002) 8

KY. REV. STAT. § 116.025(1) (1997) 8

KY. REV. STAT. § 387.590 (1984) 8

MASS. ANN. LAWS ch. 51, § 1 (1991) 8

MASS. ANN. LAWS CONST. AMEND art. 3 (2002) 8

MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002) 14

MD. CODE ANN. ELEC. § 3-102(b)(2) (2002) 8

MD. CONST. art. 1, § 4 (1981) 8

MICH. COMP. LAWS § 551.6 (1990) 20

MISS. CODE ANN. § 41-21-45 (1990) 20

MISS. CODE ANN. § 41-45-1 (1999).....19

MISS. CODE ANN. § 41-45-9 (1999).....19

MISS. CODE ANN. § 23-15-11 (1999).....8

MISS. CODE ANN. § 93-1-5 (1999).....21

MISS. CONST. art. 12, § 241 (1999) 8

MONT. CODE ANN. § 13-1-111(3) (1999).....8

MONT. CONST. art. 4, § 2 (2001).....8

N.J. CONST. art. 2 § 6 (Supp. 1999).....8

N.J. STAT. ANN. § 2B:201 (2002).....14

N.J. STAT. ANN. § 19:4-1(1) (2001) 8

NEB. REV. STAT. ANN. § 32-313(1) (Michie. 2000).....8

NEB. CONST. art. 6, § 2 (2001).....8

NEV. CONST. art. 2, § 1 (1998) 8

N.M. CONST. art. 7, § 1 (1992).....8

N.M. STAT. ANN. § 1-1-4 (Michie 1995).....8

OHIO CONST. art. 5, § 6 (1994) 8

PA. STAT. ANN. tit. 48, § 1-5 (West 1990) 20

R.I. CONST. art. 2, § 1 (2002).....8

R.I. GEN. LAWS § 15-1-5 (1988).....20

TENN. CODE ANN. § 36-3-109 (2001).....21

UTAH CODE ANN. § 30-1-2(1) (1987).....21

VT. CONST. Ch. 2, § 42 (1996).....8

VT. STAT. ANN. tit. 15, § 512 (1989).....20

VT. STAT. ANN. tit. 15, § 514 (1989).....20

VT. STAT. ANN. tit. 24, § 4409(f) (2002).....30

W. VA. CODE § 48-2-2 (1990).....20

WYO. STAT. § 1-11-101 (2002).....14

OTHER AUTHORITIES

Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002).....28

Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997).....27

GAO, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999).....24

Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, Harv. L. Rev. 1202 (1990).....22

Judicial Council of California, *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* (Jan. 1997).....13

N.Y. State Commission on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994).....13

Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 L. & Psych. Rev. 57 (1978).....19

Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* (1991).....18

Bruce Dennis Sales, et al., *Disabled Persons and the Law: State Legislative Issues* (Plenum Press 1982).....20

D. Schein, *At Home Among Strangers* (1989).....26

Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*.....8, 9

United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983).....17, 26

INTEREST OF THE *AMICI CURIAE*

Amici curiae are twenty-four associations of people with disabilities and public interest groups that advocate for the rights of people with disabilities, including The American Association of People with Disabilities, The American Association on Mental Retardation, AARP, The American Council of the Blind, The American Diabetes Foundation, The American Network of Community Options and Resources, The American Occupational Therapy Association, The Anti-Defamation League, The Arc of the United States, The Association on Higher Education and Disability, The Bazelon Center for Mental Health Law, The Brain Injury Association of America, The Epilepsy Foundation®, Lambda Legal Defense and Education Fund, Inc., The National Alliance For The Mentally Ill, The National Association for Rights Protection and Advocacy, The National Health Law Program, The National Mental Health Association, The National Senior Citizens Law Center, The National Spinal Cord Injury Association, The Polio Society, Self Help for Hard of Hearing People, TASH, and The Women and AIDS Clinic of Rutgers University School of Law. These organizations, the interests of which are described in more detail in the Appendix, wish to ensure that this Court is fully apprised of the extensive evidence of the States' patterns of unconstitutional treatment of people with disabilities supporting Congress' abrogation of Eleventh Amendment immunity for violations of Title II of the Americans with Disabilities Act ("ADA").[1]

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[1] Petitioner, Respondent, and the United States have consented to the filing of this brief. Counsel for *amici* authored the entire brief. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For far too long, States have systematically subjected Americans with a broad range of physical or mental disabilities to deplorable and unconstitutional treatment – including deprivations of their most fundamental constitutional rights. When Congress enacted Title II of the ADA, there was ample evidence that States were unconstitutionally excluding people with disabilities from voting and from accessing our judicial system, prohibiting them from marrying and raising families, warehousing them in institutions with deplorable conditions, and otherwise systematically, irrationally, and intentionally depriving them of the rights guaranteed by the Fourteenth Amendment. Unfortunately, regular instances of such unconstitutional State behavior persist even today.

Amici understand that Respondent's brief will detail the extensive evidence of State-sponsored unconstitutional treatment of people with disabilities contained in Congress' legislative record. This brief, therefore, describes the compelling record of State unconstitutional conduct found in judicial decisions and the public record. The examples in this brief, although necessarily limited by space constraints, confirm what is also plain in Congress' specific statutory findings and in the legislative history: Congress properly exercised its power under § 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity for violations of Title II of the ADA.

ARGUMENT

I. THE CONSTITUTIONAL RIGHTS AT ISSUE IN TITLE II ARE SIGNIFICANTLY BROADER THAN THOSE IMPLICATED IN TITLE I

The "first step" in analyzing the constitutionality of Congress' abrogation of the Eleventh Amendment with respect to Title II "is to identify with some precision" the

scope of the constitutional right at issue. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365 (2001). The constitutional rights at issue for Title II are different, and significantly broader, than they were for the Title I issue that the Court analyzed in *Garrett*. Title I encompasses only discrimination in employment. Title II, in contrast, is directly applicable to States, and it encompasses a broad range of State conduct in the provision of public services and benefits.[2]

When this Court assessed the "scope of the constitutional right at issue" under Title I in *Garrett*, it found that State discrimination against people with disabilities in employment matters is constitutional unless the State's action lacks a rational basis. *Id.* at 365-67 (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). The Court recognized, however, that a separate analysis of the scope of the constitutional right at issue would be appropriate under Title II. *Id.* at 360 (stating that Title II "has somewhat different remedial provisions" than Title I and declining to address whether Congress validly abrogated the States' Eleventh Amendment immunity when it enacted Title II).

The Fourteenth Amendment's due process provision encompasses and makes applicable to the States the various other affirmative provisions of the Bill of Rights. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992). Many of those due process rights – to vote, to access the courts, and

---

[2] Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "[P]ublic entit[ies]" include States and State instrumentalities and agencies. *Id.* § 12131(1)(A).

the like – come within the sphere of conduct regulated by Title II and are explicitly referenced in Congress' statutory findings to the ADA. *See* 42 U.S.C. §§ 12101(a). And, Congress plainly intended to evoke the "sweep of Congressional authority, including the power to enforce the Fourteenth Amendment" when it enacted the ADA. *Id.* § 12101(b)(4). Accordingly, in addition to the type of equal protection/rational basis claims at issue in *Garrett* and *City of Cleburne*, the "history and pattern" of state-sponsored unconstitutional behavior that Congress examined in enacting Title II properly "encompasse[d] various due process-type claims with varying standards of liability." *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813 (6th Cir.), *cert. denied*, 123 S. Ct. 72 (2002).

Assessment of many of the due process and equal protection-type violations encompassed within Title II requires heightened scrutiny because, in contrast to the discriminatory employment practices at issue in *Garrett*, those violations involve people with disabilities exercising fundamental constitutional rights. When a due process claim involves a right that this Court has deemed fundamental, it is well settled that the Fourteenth Amendment's due process clause includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis in original); *City of Cleburne*, 473 U.S. at 440 (strict scrutiny justified "when state laws impinge on personal rights protected by the Constitution"). It is equally well settled that when differential State treatment challenged under the equal protection clause impinges on a fundamental constitutional right, the discrimination is assessed under a strict scrutiny, not a rational basis, standard. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Accordingly, the "history and pattern" of State-sponsored discrimination underlying Title II includes not only irrational differential treatment of people with disabilities – although there is plenty of that conduct to be found – but also unconstitutional State conduct with respect to people with disabilities and their fundamental constitutional rights. California's suggestion that Congress' inquiry was limited to examples of invidious State discrimination without a rational basis (Pet. Br. at 9-10, 11, 17) is thus incorrect.

II. CONGRESS' SPECIFIC FINDINGS OF STATES' UNCONSTITUTIONAL DISCRIMINATION ARE CONFIRMED BY THE JUDICIAL RECORD

The second part of this Court's *Garrett* analysis asks whether Congress enacted Title II in response to "a history and pattern" of unconstitutional discrimination by the States. 531 U.S. at 368. In *Garrett*, the Court noted "strong evidence" that Congress' "failure to mention States in its legislative findings *addressing discrimination in employment* reflects that body's judgment that no pattern of unconstitutional state action had been documented." *Id.* at 372 (emphasis added).

Here, exactly the opposite is true: Congress' statutory findings are "strong evidence" that Congress could, and did, identify a pattern of unconstitutional State action in the areas that it addressed in Title II. Thus, Congress' findings explicitly and unambiguously encompass discrimination in ***public*** areas that are ***either largely or entirely within the purview of the States,*** as well as multiple areas that indisputably include state conduct. 42 U.S.C. § 12101(a)(3) (finding discrimination against individuals with disabilities persisted in "critical areas" like "education, transportation, . . . institutionalization, health services, voting, and access to public services"). Congress also specifically found that the discrimination at issue was ***irrational*** and, at times, ***intentional***, noting that individuals with disabilities

"continually" encounter discrimination that includes "outright intentional exclusion," that people with disabilities have been subjected to a "history of purposeful unequal treatment" resulting from "stereotypic assumptions," and describing the "continuing existence of *unfair* and *unnecessary* discrimination." *Id.* § 12101(a)(3), (5), (7), (9) (emphasis added). Based on these findings, Congress aimed Title II directly at State conduct. *Id.* § 12132(1)(A).

California's suggestion that the States were somehow "left out" of Congress' intended targets under Title II (Pet. Br. at 18-21) ignores Congress' findings and the text of Title II. Rather, Congress explicitly found pervasive, irrational, and intentional discrimination against people with disabilities in areas controlled by States, and it applied Title II directly to the States.

Congress' findings are entitled to substantial deference. *City of Boerne*, 521 U.S. at 536. Congress and the courts are co-equal actors with separate and different roles in our tri-partite system of government. Congress is uniquely suited to make determinations based on a wider and different set of information than that available to courts adjudicating specific cases. Judicial deference to Congress' determinations recognizes Congress' skill in performing its specifically legislative function. *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") (citations omitted).

Congress' findings of State-sponsored discrimination in areas encompassed by Title II are also amply supported by the ADA's legislative history – as detailed in Respondent's brief – and by the extensive examples from the judicial and public record described in Section III below. The Court need not limit its review to the specific legislative record, although that record is replete with examples of unconstitutional State

conduct in the areas encompassed by Title II. *Id.* at 200, 209, 211-13 (examining evidence outside the legislative record to evaluate Congress' exercise of legislative power). This brief provides a sampling of the judicial decisions and other public materials that demonstrate that States regularly deprived people with disabilities of their most fundamental constitutional rights. The Court can, and should, presume that Congress was aware of such decisions when it enacted Title II. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts should presume that Congress is aware of relevant legal precedents).[3]

III. THE STATES HAVE HISTORICALLY DEPRIVED AMERICANS WITH DISABILITIES OF THEIR CONSTITUTIONAL RIGHTS

A. Patterns of Unconstitutional State Conduct Involving The Fundamental Right to Vote

When it passed the ADA, Congress found persistent discrimination in the "critical" area of "voting." *See* 42 U.S.C. § 12101(a)(3). The fundamental right to vote is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Classifications infringing the ability to exercise the right to vote must be examined under strict scrutiny. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

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[3] Moreover, even the numerous judicial decisions finding unconstitutional State behavior do not reflect the pervasive nature of such conduct, in light of Congress' findings of invidious and persistent social and political segregation and isolation, and the resulting powerlessness, of people with disabilities. 42 U.S.C. § 12101(a)(2), (5), (6), (7). For instance, people with disabilities were and still are presented with difficult and often insurmountable barriers in accessing the very judicial system that exists to address their wrongs. *See infra* § III.B.

1. States Disenfranchise People With Disabilities

States have historically prevented Americans with mental disabilities from exercising their fundamental right to vote through a host of laws, many of which are still on the books. Forty-two States currently have laws disenfranchising Americans with mental disabilities in a variety of contexts.[4] *See Doe v. Rowe*, 156 F. Supp. 2d 35, 38 n. 2 (D. Me. 2001). Similar and more egregious laws were on the books when Congress enacted the ADA. Indeed, the concurring opinion in *City of Cleburne* had described them just five years before.

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[4] *See, e.g.*, Alaska (ALASKA CONST. art. V, § 2 (2000)) (persons of unsound mind); Arkansas (ARK. CONST. art. 3, § 5 (1987); *id.* amend. 51 § 11(a)(6) (2001)) (idiots or insane; adjudicated mentally incompetent); Delaware (DEL. CONST. art. 5, § 2 (Supp. 2000), DEL. CODE ANN. tit. 15 § 1701 (1999)) (idiot or insane); Hawaii (HAW. CONST. art. 2, § 2 (1997)) (*non compos mentis*); Iowa (IOWA CONST. art. 2, § 5 (2000)) (idiot or insane); Kansas (KAN. CONST. art. 5, § 2 (1988)) (mental illness); Kentucky (KY. CONST. § 145(3) (2002), KY. REV. STAT. §§ 116.025(1) (1993), 387.590 (1984)); Maryland (MD. CONST. art. 1, § 4 (1981), MD. CODE ANN., ELEC. § 3-102(b)(2) (2002)) (under care or guardianship for mental disability); Massachusetts (MASS. ANN. LAWS CONST. AMEND. art. 3 (2002); MASS. ANN. LAWS ch. 51, § 1 (1991)) (under guardianship); Mississippi (MISS. CONST. art. 12, § 241 (1999); MISS. CODE ANN. § 23-15-11 (1999)) (idiots and insane); Montana (MONT. CONST. art. 4, § 2 (2001), MONT. CODE ANN. § 13-1-111(3) (1999)) (adjudicated unsound mind unless finding reversed); Nebraska (NEB. CONST. Art. 6, § 2 (2001); NEB. REV. STAT. ANN. § 32-313(1) (Michie. 2000)) (*non compos mentis*); Nevada (NEV. CONST. art. 2, § 1 (1998)) (idiot or insane); New Jersey (N.J. CONST. art. 2 § 6 (Supp. 1999), N.J. STAT. ANN. § 19:4-1(1) (2001)) (idiot or insane); New Mexico (N.M. CONST. art. 7, § 1 (1992), N.M. STAT. ANN. § 1-1-4 (Michie 1995)) (idiots or insane); Ohio (OHIO CONST. art. 5, § 6 (1994)) (idiots or insane); Rhode Island (R.I. CONST. art. 2, § 1 (2002)) (adjudicated *non compos mentis*); Vermont (VT. CONST. Ch. 2, § 42 (1996)) (not quiet and peaceable). *See* Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. of Emp. & Lab. L. 437, 456 tbl. 2 (2000), for a chart describing these statutes.

473 U.S. at 464 (citing 1979 article finding that "most states still categorically disqualified 'idiots' from voting") (Marshall, J., concurring in part and dissenting in part).[5]

Such laws are unconstitutional when, factually or as applied, they categorically exclude people with disabilities from voting, without reference to individual competence. Such categorical exclusions do not satisfy any compelling State interest in protecting the integrity of the electoral process, much less provide the least restrictive means of doing so. Indeed, it is difficult to articulate how such laws meet even minimal standards of due process. One recent case overturning a fairly typical State disenfranchisement provision aptly illustrates the defects in such laws. In *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001), a Maine statute prohibiting individuals under guardianship for reason of "mental illness" from registering to vote or voting failed to pass constitutional muster on due process and equal protection grounds. The court applied strict scrutiny, and found that the State had "disenfranchised a subset of mentally ill citizens based on a stereotype rather than any actual relevant incapacity." *Id.* at 52. The court also found the statute facially unconstitutional under the equal protection clause, because the State's insistence on looking to archaic categories such as "idiotic," "lunatic" and "unsoundness of mind" to determine who was excluded from voting based on mental illness permitted improper classifications and disenfranchised an overbroad class of individuals. *Id.* at 54-55. *See also, e.g., Manhattan State Citizens Group Inc. v. Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute prohibiting individuals involuntarily committed to mental institution from voting was unconstitutional as applied).

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[5] When Congress enacted the ADA, the American Bar Association had opined that most of these statutes were unconstitutional. *Id.* at 451.

2. States Deny Access To Voting Equipment and Polling Places

States have also discriminated by denying individuals with disabilities physical access to both polling places and voting machines. Although the cases in the area are generally decided on statutory rather than constitutional grounds, it is hard to imagine a compelling State interest in making it difficult or impossible for people with disabilities to exercise their fundamental right to vote, particularly when necessary modifications often come at a minimal cost. For example, in *National Organization on Disability v. Tartaglione*, 2001 WL 1231717 (E.D. Pa. Oct. 11, 2001), a group of plaintiffs with visual and mobility impairments brought suit against, among others, the Secretary of the Commonwealth of Pennsylvania, because the Secretary could, but had not, approved voting machines that would allow plaintiffs with visual impairments to participate fully in the voting process. *See also American Ass'n of People With Disabilities v. Smith*, 227 F. Supp. 2d 1276 (M.D. Fla. 2002) (declining to dismiss a suit against Florida officials where State officials certified machines which did not provide equal access to voters with disabilities); *Hill v. New York State Bd. of Elections*, 503 N.Y.S.2d 958 (N.Y. Sup. Ct. 1986) (State board of elections had continually permitted local entities to locate polling places in sites inaccessible to people with disabilities).

B. Patterns Of Unconstitutional State Interference With Equal And Effective Access To The Courts

1. States Exclude People With Disabilities From The Judicial Process As Litigants

States have historically denied persons with disabilities an equal opportunity to use the State courts as litigants by not providing interpreters or other necessities for effective communication, or by imposing architectural barriers that exclude persons with mobility or sensory impairments from using the court system. Such inaccessibility presents due

process issues when people with disabilities are unable effectively to access the judicial system, either in the criminal or civil context. For criminal defendants, the due process clause guarantees that an "accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to participate meaningfully in the process unless their exclusion furthers an important governmental interest. *See, e.g., Logan v. Zimmeman Brush Co.*, 455 U.S. 422, 429 (1982) ("[t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (except in extraordinary circumstances, state must provide all civil litigants a meaningful opportunity to be heard).

Examples of exclusion from the judicial process in the civil arena are common. In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.), *cert denied*, 123 S. Ct. 72 (2002), for instance, a person who was partially deaf alleged that the State court failed to provide him with adequate hearing assistance in his child custody case in violation of his equal protection and due process rights. The Sixth Circuit noted the fundamental nature of the rights at stake in parental custody hearings, and the procedural safeguards that this Court has repeatedly held are necessary in such hearings, including counsel for indigent defendants and free access to the trial records. *Id.* at 813-14 (citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 30 (1981); *Santowsky v. Kramer*, 455 U.S. 745, 769-70 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996)). The court explained that "a state's failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing

party, an essential element of our adversary system." *Id.* at 815. Concluding that the suit raised "obvious due process problems," the Sixth Circuit remanded the case for retrial on the unreasonable exclusion claim.

In the criminal process, likewise, there are a number of cases in which authorities did not provide sufficient interpretation services, or otherwise effectively excluded people with disabilities from participating meaningfully in their court proceedings. In *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 123 S. Ct. 72 (2002), for instance, a class of prisoners with disabilities alleged that California failed to provide them adequate access to, and a meaningful opportunity to participate in, their parole hearings. The process depended "to a great extent" on written forms; prisoners and parolees with disabilities were "provided with inadequate accommodations to help them understand the content of those forms, and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal." *Id.* at 857. The system did not provide American Sign Language interpretation services, Braille copies of documents, qualified readers, or staff capable of effectively communicating with prisoners and parolees with mental retardation or mental disabilities. *Id.* at 858 n.10. Affirming a lower court decision on ADA grounds, the Ninth Circuit held that the "minimal due process measures taken [by the defendant parole board] were insufficient to comply with the ADA or to enable plaintiffs properly to invoke or assert their rights." *Id.* at 862. And, there was no reasonable relation to any legitimate penological interest that could justify the impingement on the prisoners', and parolees', constitutional rights. *Id.* at 873-74.[6]

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[6] *See also People v. Rivera*, 480 N.Y.S.2d 426 (N.Y. Sup. Ct. 1984) (deprivation of due process where defendant with hearing impairment was

These kinds of problems, which prevent people with disabilities from effectively accessing the judicial system and vindicating their rights, remain all too common today. In 1997 for instance, the California Judicial Council concluded that many California court buildings were not accessible to persons with disabilities, lacked proper communications equipment, had insufficient interpreters, presented architectural barriers, and otherwise denied equal access to persons with disabilities.[7]

2. States Exclude People With Disabilities From The Judicial Process As Jurors

"Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others . . . than it may invidiously discriminate in the offering . . . of the elective franchise." *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970). "The harm from discriminatory jury selection . . . touch[es] the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). There is no compelling interest in, nor any rational basis for, excluding people with physical and mental disabilities from jury service without regard to their individual ability to

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sentenced as two time offender, and in earlier convictions, had been denied services of an interpreter); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1033 (S.D.N.Y. 1995) (failure to provide interpreters for inmates with hearing impairments for parole and disciplinary hearing violates due process).

[7] *Summary of Survey and Public Hearing Reports of the Access for Persons with Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee* 8-12 (Jan. 1997), available at www.courtinfo.ca.gov/reference/summarydisabilities.htm; *see also* N.Y. State Comm'n on Quality of Care for the Mentally Disabled, *Survey of Access to New York State Courts For Individuals With Disabilities* (June 1994) (only 8% of New York courts fully accessible to people with disabilities; "significant barriers" to access remain), available at www.cqc.ny.us/publications/pubcourt.htm.

function effectively as jurors. Nonetheless, when Congress passed the ADA, it was relatively common for State courts to refuse categorically to seat people with certain disabilities on juries.

Until 1994, for instance, Arkansas forbade people with "substantial impairments" to hearing or sight from participating as jurors. ARK. CODE ANN. § 16-31-102 (1987), *amended*, 1994 Ark. Acts No. 4, § 6 (1994).[8] The District of Columbia Superior Court continued to exclude all blind persons from jury service through 1993. *Galloway v. Superior Court*, 816 F. Supp. 12, 16-17 (D.D.C. 1993) (the "conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate" with ADA). In *DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989), a judge serving on Pennsylvania's superior court testified that "he would disqualify a deaf person under all circumstances." In 1985, the Missouri Supreme Court permitted the categorical exclusion of "deaf, mute, deaf-mute, and blind persons from inclusion in the jury pool." *State v. Spivey*, 700 S.W.2d 812, 813-14 (Mo. 1985) ("We doubt that deaf persons have a community of attitudes or ideas."). Even today, a number of States have statutes that limit jury service to those who can "read," "write," or "speak" English, with no statutory exception for people who use American Sign Language or Braille – the same statutes that supported categorical exclusion of deaf and blind jurors in *Spivey* and *DeLong*. *See, e.g.*, ALA. CODE § 12-16-60 (1995); MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (2002); N.J. STAT. ANN. § 2B:201 (2002), among others. *See also*

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[8] Copies of all non-current statutes cited in this brief are reproduced in the Appendix. The cited statutes are only exemplars, and do not purport to represent *all* the discriminatory statutes in a particular area.

WYO. STAT. § 1-11-101 (2002) (jurors "in possession of . . . natural facilities").

C. Patterns Of Unconstitutional State Discrimination Against People With Disabilities In Licensing

State governments regulate transportation and many areas of economic life through licensing programs. Historically, licensing programs have functioned to exclude some individuals with disabilities unfairly from certain activities. For decades, for instance, States denied individuals with physical or mental disabilities the privilege of obtaining or holding a driver's license regardless of whether they could meet or exceed state eligibility requirements, often causing the loss of a job. Such denials were frequently based on the mere unsubstantiated belief that individuals with disabilities like epilepsy or diabetes simply could not operate an automobile safely – violating these individuals' rights to due process. *See, e.g., In re Wiseman's Appeal*, 32 Pa. D. & C.3d 294, 1983 Pa. D. & C. LEXIS 69 (C.P. 1983) (regulation prohibiting individuals with epilepsy from driving unless seizure-free for one year violated due process; appellant, who had unblemished driving record and had one seizure during his lifetime, lost his license and his job as a truck driver); *Tolbert v. McGriff*, 434 F. Supp. 682 (M.D. Ala. 1977) (suspension of license without notice or hearing based on one seizure in fifteen years violated due process); *Jackson v. State*, 544 A.2d 291 (Me. 1988) (State denied applicant opportunity to receive a bus driver endorsement based on his insulin-dependent diabetes even though he had never missed work or been hospitalized).

D. Patterns of Unconstitutional State Discrimination In Education

"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). It is plainly an equal protection violation for States to exclude children with disabilities from

public education entirely. *See San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (distinguishing "absolute denial" of education from inequalities in funding). States nevertheless have historically discriminated against people with disabilities by excluding them from educational opportunities, and this pattern continues to the present day.

Earlier in the last century, a number of States categorically excluded children with disabilities from public education. *See, e.g.*, DEL. CONST. art. 10 § 1 (1975) (establishing free public schools for all children *except* those who were "physically or mentally disabled"). When Congress enacted the Education of All Handicapped Children Act ("EHA") in 1975, it compiled an extensive record that States simply did not educate children with disabilities. Based on this record, Congress found that one million children were "*excluded entirely*" from the public school system, and "more than half" of the 8 million children with disabilities did not receive appropriate educational services. 20 U.S.C. § 1400(b) (emphasis added).

Judicial decisions confirm Congress' conclusion. In *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), for instance, students with mental retardation charged that Pennsylvania statutes excluded them from schools. The court found that the plaintiffs had articulated equal protection and due process claims under the rational basis test. *See also Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (due process violation when defendant excluded students with disabilities from public education). Congress considered these cases and others like them when it enacted the EHA. *See Honig v. Doe*, 484 U.S. 305, 310 (1988) ("by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States"). Even when unconstitutional statutory schemes were remedied, States continued to violate the equal protection clause by excluding

students with disabilities from educational opportunities. *See, e.g., Panitch v. Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977).

These constitutional violations continued when Congress enacted the ADA, fifteen years later. In fact, Congress relied upon a Civil Rights Commission Report finding that, notwithstanding the EHA, "a great many handicapped children continue to be excluded from the public schools."[9] Congress found, therefore, that States still were discriminating against children with disabilities in the "critical area" of "education." 42 U.S.C. § 12101(a)(3). Unfortunately, instances of unconstitutional State exclusion persist even today. *See, e.g., Robinson v. Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding), *aff'd*, 295 F.3d 1183 (10th Cir. 2002).

E. Patterns Of State Interference With The Fundamental Right To Marry And Form Families

1. States Sterilize Persons With Disabilities

The Court has repeatedly recognized an individual's fundamental right to control his or her ability to procreate "free from unwarranted governmental intrusion." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The Court has also recognized a fundamental right to bodily integrity under the Fourteenth Amendment's due process clause. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990). Limitations on this fundamental right are subject to strict scrutiny. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-86 (1977).

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[9] United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29 (1983) ("*Accommodating the Spectrum*").

The States share a long and shameful pattern of depriving Americans with disabilities the right and ability to procreate. Earlier in the last century, most States had laws authorizing involuntary sterilization of persons with disabilities.[10] Some of those laws were still in force when Congress enacted the ADA, although commentators generally had long concluded that "compulsory sterilization laws, no matter what their rationale, [we]re unconstitutional in the absence of evidence that compulsory sterilization [wa]s the only remedy available to further a compelling governmental interest."[11] In 1991, for instance, an Arkansas court overturned a State statute authorizing sterilization of "mentally deficient persons" without provision for notice, right of representation, right of hearing, and judicial oversight of sterilization decision as violative of due process. *McKinney v. McKinney*, 805 S.W.2d 66 (Ark. 1991). *See also Motes v Hall County Dep't of Family & Children Serv.*, 306 S.E.2d 260, 261-62 (Ga. 1983) (Georgia statute authorizing sterilization on "legal preponderance" of evidence did not meet constitutional requirements, because due process requires "clear and convincing evidence").[12] In 1981, former patients of Virginia institutions who were involuntary sterilized under a 1924 statute articulated a continuing constitutional violation, based on the State's continuing failure to *notify* them that they had been involuntarily sterilized – causing them to suffer

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[10] *See generally* Phillip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* 45-55 (1991).

[11] *See In re A.W.*, 637 P.2d 366, 368-69 (Colo. 1981) (citing Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977), and others).

[12] Moreover, in the decades immediately before the ADA, State courts still were *upholding* sterilization statutes, citing the infamous decision in *Buck v. Bell*, 274 U.S. 200 (1927). *See, e.g., In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976); *Cook v. State*, 495 P.2d 768 (Or. 1972).

"medical, emotional, and mental problems, arising in large part from unsuccessful and uninformed attempts to deal with their infertility." *Poe v. Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 793 (W.D. Va. 1981).

Even after compulsory sterilization statutes were repealed, some States enacted statutes that allowed sterilization on the consent of the superintendent of a custodial care institution or a guardian.[13] Sterilization on the basis of substituted consent still involves State action threatening the fundamental right of procreation.[14] Relying on substituted consent, courts have permitted third persons to consent to sterilizations in circumstances in which the facts indicate that no compelling interest was at stake. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978) (15 year old girl with mild retardation sterilized involuntarily after judge approved, *ex parte*, her mother's petition, without notice to the daughter or appointment of a guardian *ad litem*, although the daughter attended public school and had been promoted each year with her class); *Downs v. Sawtelle*, 574 F.2d 1, 5

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[13] Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 L. & Psych. Rev. 57 (1978). *E.g.*, MISS. CODE ANN. §§ 41-45-1, 41-45-9 (1999) (sterilization of "insane, idiotic, imbecile or feeble-minded" person who "by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted," upon petition of director of State institution after hearing); IND. CODE § 22-1601 (1950).

[14] One commentator has noted that the use of substituted consent in the sterilization context is "a fiction which authorizes the state to intervene because a party other than the subject provides the green light'" Price & Burt, *supra* note 13, at 58-60. *See also, e.g., In re A.W.*, 637 P.2d at 370 ("consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.").

(1st Cir. 1978) (21 year old woman who was deaf and mute sterilized with consent of her guardian based on doctor's report recommending the operation "based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences").

2. States Prohibit The Marriage of People With Disabilities

Marriage is one of the "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), so the right to marry has long been considered fundamental, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). State laws restricting the right of a class of persons to marry are unconstitutional unless the State can show a compelling interest. *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

Nevertheless, numerous State statutes historically and categorically restricted the right of persons with disabilities to marry, without a determination of individual capacity, in a manner that cannot withstand strict scrutiny. Many States maintained such restrictive statutes through the enactment of the ADA.[15] Just five years before Congress enacted Title II, for instance, this Court noted in *City of Cleburne* that it was

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[15] CAL. CIV. CODE § 4201 (1987) ("imbecile"; "insane"); D.C. CODE ANN. § 30-103 (1981) ("idiot"; "lunatic"); IOWA CODE ANN. § 595.3 (1990) ("a mental retardate"; "mentally ill"); MICH. COMP. LAWS § 551.6 (1988) ("feebleminded"; "imbecile"; "insane"); MISS. CODE ANN. § 41-21-45 (1990) (unlawful to cohabit with "feebleminded" female); PA. STAT. ANN. tit. 48, § 1-5 (WEST 1990) ("weak-minded"; "insane"); R.I. GEN. LAWS § 15-1-5 (1988) ("idiot"; "lunatic"); VT. STAT. ANN. tit. 15, § 514 (1989) ("idiot"; "lunatic"); *id.* tit. 15, § 512 (1989) ("physically incapable"); W. VA. CODE § 48-2-2 (1990) ("insane"; "idiot"; "imbecile") (copies included in Appendix). *See* Bruce Dennis Sales, et al., *Disabled Persons and the Law: State Legislative Issues* 16-20 (Plenum Press 1982) (as of 1980, 42 States and the District of Columbia had statutes restricting marriage for persons with disabilities).

still a criminal offense in several states for people with mental retardation to marry. 473 U.S. at 463 & note 12.

Some statutes discriminating against persons with disabilities in the right to marry are still on the books. TENN. CODE ANN. § 36-3-109 (2001), for instance, forbids issue of a marriage license "when it appears that the applicants or either of them is at the time drunk, insane or an imbecile." *See also* MISS. CODE ANN. § 93-1-5 (1999) (same); D.C. CODE ANN. § 46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void). In 1987, Utah declared that marriage with "a person afflicted with acquired immune deficiency syndrome" is "prohibited" and "void." UTAH CODE ANN. § 30-1-2(1) (1987) (declared "void and invalid" on statutory grounds in *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)). Such statutes provide States with the authority to deny marriage licenses to people on the basis of disabilities without any compelling interest or, indeed, any rational basis.

3. States Discriminate Against Parents With Disabilities

The right to raise one's children is protected by the Constitution. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Balanced against this right is the state's interest in the welfare of the child. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). The fundamental nature of the rights inherent in the parent-child relationship compel the conclusion that any statute regulating this relationship must withstand strict scrutiny. *Troxel v. Granville*, 530 U.S. 57, 80 (2000).

In the parent-child relationship, States historically have treated parents with mental retardation and mental or physical disabilities quite differently from other parents. "[D]iscrimination begins with the initial decision to intervene, ends in the decision to terminate the relationship,

and is manifest in nearly every significant decision along the way."[16]

States and State courts often appear to rely on stereotypes in determining custody disputes involving parents with mental or physical disabilities, even in cases citing the "best interest of the child" standard. In *Bednarski v. Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985), a Michigan trial court terminated a deaf woman's custody of her "[t]wo normal children," citing her deafness, forcing the appellate court to reverse. In another example, a trial judge ordered that a blind father – a successful CEO of a computer company – must be accompanied at all times by a "responsible adult" while caring for his daughter, simply because of his disability. *Clark v. Madden*, 725 N.E.2d 100, 103 (Ind. Ct. App. 2000) (reversing trial court). In *H.J.B. v. P.W.*, 628 So. 2d 753, 756 (Ala. Civ. App. 1993), an Alabama court affirmed a father's loss of custody primarily because he was HIV-positive.[17]

State agencies have also classified children with disabilities as "unadoptable" in violation of their constitutional rights. In *Baby Neal v. Casey*, 821 F. Supp.

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16 Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv. L. Rev. 1202, 1227 (1990).

17 *See also In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing order of trial judge awarding custody to "immoral" and "dishonest" mother because of unsubstantiated fear that the children would be "emotionally damaged because of [the father's] handicap," multiple sclerosis); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (condemning trial court's conclusion that father "was deemed forever unable to be a good parent simply because he is physically handicapped" because "like most stereotypes, this is both false and demeaning"); *Adoption of Richardson*, 59 Cal. Rptr. 323, 327 (Ct. App. 1967) (reversing trial court refusal to permit a deaf couple to adopt a child; "[t]here can be no doubt that the judge was biased and prejudiced" against the parents "solely because they were deaf-mutes." *Id.* at 329-30. *Moye v. Moye*, 627 P.2d 799 (Idaho 1981) (epilepsy).

320 (E.D. Pa. 1993), for instance, the court permitted due process claims to proceed on behalf of two children classified as "unadoptable" by the Philadelphia Department of Human Services, one because he was tested positive for AIDS, the other because he was "handicapped."

F. Pattern of Unconstitutional State Treatment Of People With Disabilities In Institutions

In enacting the ADA, Congress found continuing State-sponsored discrimination in the "critical" area of "institutionalization," and noted as well pervasive discrimination against people with disabilities through "segregation." *See* 42 U.S.C. § 12101(a)(3), (5). The record before Congress when it passed Title II was replete with examples of unconstitutional State-sponsored discrimination in both civil and penal institutions. Such discrimination continues today.

1. States Institutionalize People With Disabilities Without Necessity And Treat Them Deplorably While They Are In Civil Institutions

Just eight years before Congress enacted the ADA, this Court decided *Youngberg v. Romeo*, 457 U.S. 307, 315-19 (1982), confirming that people in civil institutions are constitutionally entitled to safe conditions, freedom from unnecessary bodily restraints, and the training necessary to assist them in securing those rights. Nonetheless, the States when the ADA was enacted and today have proven resistant to improving the deplorable unconstitutional conditions in some civil institutions.

A case brought by a class of children with mental retardation, emotional disturbances, and physical disabilities against the State of Louisiana is a prime example of a State's continuing unconstitutional behavior. In 1976, the plaintiffs established unnecessary physical abuse, neglect, and unnecessary restraint of its wards, and the judge ordered

remedial action. *Gary W. v. State of Louisiana*, 437 F. Supp. 1209, 1219, 1213 (E.D. La. 1976). In 1990, *twenty-five years later*, and notwithstanding the judge's efforts "to facilitate, cajole, and even coerce compliance," the State institutions still were unable to prevent outright abuse of patients, or to provide minimally adequate treatment, consistent with constitutional standards. *Gary W. v. State of Louisiana*, 1990 U.S. Dist. LEXIS 1746, at *81 (E.D. La. Feb. 15, 1990).[18]

Other egregious examples abound. A federal judge recently described Alabama's institutions as "essentially warehousing patients in an inhumane environment." *Wyatt v. Rogers,* 985 F. Supp. 1356, 1361-62 (M.D. Ala. 1997). The same institutions were the subjects of similar findings, of unconstitutional conduct as early as 1971 for "grossly substandard" instances including examples of residents being scalded to death and restrained in a straitjacket for nine years, among others. *Wyatt v. Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1305 (5th Cir. 1974). The year that Congress passed Title II, the staff at a New York facility for people with mental retardation regularly left the children in their care lying half-naked and unattended in their own urine and feces on cold floors while the staff watched

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[18] Just three years ago, the General Accounting Office documented the continuing practice of unnecessary physical restraint among State institutions. GAO, *Mental Health: Improper Restraint or Seclusion Use Places People at Risk* (Sept. 1999), available at www.gao.gov/archive/1999/he99/he99176.pdf. The Department of Justice likewise has settled, with consent orders, several recent egregious cases involving unnecessary physical restraints. *See, e.g.*, Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, DOJ, to The Honorable Thomas J. Vilsack, Governor of Iowa (July 9, 2002) (residents in Iowa institution spent an average of 18 hours a month in mechanical restraints, some for as long as 300 hours a month, and many residents were injured by the use of such restraints) (available at www.usdojgov./crt/split/documents, along with several other examples).

television. *Society for Good Will to Retarded Children v. Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990).[19]

In addition to treating people with disabilities deplorably while they are in institutions, the States have a long and unconstitutional history of institutionalizing people unnecessarily. The Constitution protects individuals from unnecessary confinement in an institution. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (if the basis for commitment ceases to exist, continued confinement deprives the individual of a significant liberty interest).

Historically, the States institutionalized individuals with mental retardation or deafness as a matter of course, based on false stereotypes, the "science" of eugenics, and pure xenophobia. *City of Cleburne*, 473 U.S. at 461-62 (describing a pattern of State-mandated institutionalization that "paralleled the worst excesses of Jim Crow") (Marshall, J., concurring in part and dissenting in part). Although the laws that mandated institutionalization have largely been repealed, there still is ample evidence of unnecessary and unconstitutional civil commitment. Congress was aware of

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[19] *See also, e.g., Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306-09 (E.D. Pa. 1977) (unconstitutional, deplorable, and hazardous conditions, including widespread inappropriate use of restraints and incidents of direct abuse from staff persons; the walls of the institution were covered in feces and urine and the residents were subject to outbreaks of infectious disease), *rev'd on other grounds*, 451 U.S. 1 (1980); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473, 476 (N.D. 1982) (constitutional violations in North Dakota institutions; drugs were administered casually, often to the wrong individual; residents were regularly left naked in front of other residents; individuals' health worsened rather than improved), *aff'd*, 713 F.2d 1384 (8th Cir. 1983); *Lelsz v. Kavanagh*, 673 F. Supp. 828, 844-48 (D.N.D. Tex. 1987) (systemic understaffing and communications failures led to inappropriate medication and deaths; behavior modification techniques were "state of the art 1950s").

such evidence when it passed the ADA,[20] and the judicial record amply confirms that it exists. For example, in *Clark v. Cohen*, 794 F.2d 79, 85-86 (3d Cir. 1986), the Third Circuit documented a ten-year effort by staff at a Pennsylvania institution to secure the release of a woman with mild retardation. At age 15, in 1956, she was labeled as "severely defective" and committed without a hearing. *Id.* at 85. Even after the statute under which she was committed was repealed, and despite her doctors' recommendations that she be released, State officials never reviewed her case. *Id.* In the end, Pennsylvania did not dispute that ***forty years*** of unnecessary institutionalization had deprived the plaintiff of any hope of living the rest of her life without supervised care. *Id.* at 83. In *Eric L. By and Through Schierberl v. Bird*, 848 F. Supp. 303 (D.N.H. 1994), the court found that the State violated procedural due process, equal protection, and the ADA when it segregated children with disabilities in institutions which isolated them and denied them services and placement opportunities comparable to those available to children without disabilities.[21]

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[20] *See Accommodating the Spectrum* at 34 (noting that "segregationist purpose" of institutions continued; institutions still "lack rational admitting criteria," among other defects).

[21] *See also Thomas S. v. Morrow*, 781 F.2d 367, 369-73 (4th Cir. 1986) (North Carolina violated constitutional rights of man with mild retardation when it moved him from State hospital to a detox center rather than providing non-residential support services as hospital recommended); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243, 1294-96 (D.N.M. 1990) (New Mexico deprived a class of unnecessarily-committed individuals with developmental disabilities of substantive due process rights in numerous instances), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992); D. Schein, *At Home Among Strangers* (1989) (describing numerous deaf individuals committed under repealed statutes allowing for commitment solely by reason of deafness or erroneously considered to have mental disabilities; continued commitment had not been reviewed). The problem of unnecessary institutionalization is still

2. States Ignore The Medical Needs Of Prisoners With Disabilities And Otherwise Violate Their Constitutional Rights

The Eighth Amendment prohibits disproportionate punishments, *Weems v. United States*, 217 U.S. 349, 366-67 (1910), and the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). State prisons nevertheless abuse prisoners with disabilities as a matter of course, denying them these fundamental constitutional protections. For example, a Michigan prison routinely forced two paraplegic inmates to sit in their own feces for hours at a time, causing them medical complications. *Parrish v. Johnson*, 800 F.2d 600, 602-03 (6th Cir. 1986). Staff habitually refused to relay the prisoners' requests for aid to nurses, and deliberately placed their food trays in inaccessible positions. Moreover, prison officials did nothing to stop a guard who on several occasions assaulted the inmates with a knife and frequently called one inmate a "crippled bastard who should be dead." *Id.* at 603. The State's conduct furthered "[n]o legitimate penological or institutional objective." *Id.* at 605.

State prisons also regularly and unconstitutionally engage in deliberate indifference to the medical needs of prisoners with disabilities, in contravention of this Court's holding in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).[22] This practice subjects prisoners with disabilities to a double punishment: In addition to their sentence, they suffer unnecessary pain and loss of dignity.

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unfortunately pervasive. *See* Sharon P. Davis, *A Status Report to the Nation on People with Mental Retardation Waiting for Community Services* (1997), available at www.thearc.org/misc/WaitPAge/html.

[22] *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 210 (1998), confirmed that prisoners with disabilities can sue State prisons under Title II for discrimination in the provision of medical 'services.

In *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13, 25 n.9, *vacated pending en banc rehearing*, 310 F.3d 785 (1st Cir. 2002), for instance, an inmate with Gehrig's Disease sued New Hampshire under the ADA and State laws. *Id.* at 14-15. During his confinement Mr. Kiman gradually lost the ability to control his voluntary muscles. *Id.* at 15. Despite his repeated requests, the State refused to provide him with a cane to walk or a chair to use in the shower; cuffed his hands behind his back rather than in front despite his pleas of pain; refused to move his cell from the third tier despite his inability to climb stairs; and refused to provide him a special toilet, requiring him to rely on the goodwill of his cellmates to engage in personal hygiene. *Id.* at 16. The First Circuit held that the complaint fairly could be read to allege a violation of both the Eighth Amendment and equal protection. *Id.* at 24 & 25 n.9.

The suffering endured by inmates with disabilities is reaching crisis proportions. Prisoners with disabilities are over-represented in the criminal justice system and are swelling the ranks of penal institutions.[23] A recent class action in California illustrated State-wide systemic and unconstitutional abuse of prisoners with mental disabilities. In *Coleman v. Wilson*, 912 F. Supp. 1282, 1305-23 (E.D. Cal. 1995), the record revealed that California failed to: screen inmates for medical needs; maintain basic medical records and medication policies; maintain adequate and competent staffing; appropriately use mechanical restraints; and prevent inappropriate disciplinary and behavior control measures on prisoners with mental disabilities, including use of isolation

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[23] *See* Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002) available at www.consensusproject.org. Once incarcerated, inmates with disabilities are far more likely to be victimized, exploited, and injured than other inmates. *See, e.g., Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982).

and taser guns. *Id.* Each one of these practices violated the prisoners' constitutional rights. *Id.* at 1305-25.[24]

G. Patterns Of Irrational State Segregation Of People With Disabilities From the Community

Even outside the walls of State-run institutions, the States have historically segregated Americans with disabilities from the community at large through discriminatory zoning laws. Such laws lack a rational basis when they treat people with disabilities differently than other groups without justification. *City of Cleburne*, 473 U.S. at 450 (ordinance requiring a group home for people with mental retardation to obtain a special use permit but not requiring other groups to obtain similar permits violated equal protection).

Over the past decades, many individuals with disabilities have moved from institutional settings into more integrated community settings. Unfortunately, States and municipalities reacting to pressure based on stigma and prejudice responded by enacting dispersion laws that prevent the concentration of community residences for individuals with disabilities in one area. *Epicenter, Inc. v. City of Steubenville*, 924 F. Supp. 845, 849 (S.D. Ohio 1996) (cities "reacted to the deinstitutionalization movement" like "postbellum Southern state governments that passed Jim Crow laws").

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[24] *See also, e.g., Ruiz*, 503 F. Supp. at 1274-1391 (126 page opinion describing Texas' unconstitutional treatment of prisoners with disabilities, including among many other examples routinely denying prescribed treatments for prisoners who use asthmatic inhalers and wheelchairs and disciplining prisoners with mental retardation for infractions of rules they did not understand); *Yarbaugh v. Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (prisoner with multiple sclerosis was incarcerated for over a year before he was seen by a physician and did not receive assistance in daily activities; as a consequence, he had not showered in over a year and had fallen repeatedly attempting to move from his wheelchair to his bed).

When Congress enacted Title II, this form of discrimination was extensive, and involved State as well as local/municipality action. In *Larkin v. Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994), for instance, the court considered a Michigan law forbidding the licensing of a group home for people with disabilities if the group home was to be located within 1500 feet of another group home. *Id.* Finding that the dispersion requirements placed quotas on the people with disabilities who could live in a residential neighborhood, the court struck the law as without rational basis and thus violative of equal protection guarantees. *Id.* at 179-80.[25] *See also Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 n.20 (10th Cir. 1995) (statutory claim involving Utah law mandating that community housing for people with "handicap[s]" provide 24-hour supervision; "if this case had been brought as an equal protection claim, there is no evidence that the zoning restrictions were rationally related to legitimate government concerns and not based on unsubstantiated fears or irrational prejudices").

CONCLUSION

Congress' specific findings, the materials cited in this brief, and the legislative history detailed in other briefs all provide extensive and compelling evidence that States perpetuated a pattern of unconstitutional discrimination.

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[25] The Sixth Circuit affirmed on statutory grounds without reaching the constitutional issue. 89 F.3d 285 (6th Cir. 1996). Other States have similar dispersion requirements. *See, e.g.*, CONN. GEN. STAT. § 8-3f (2001); DEL. CODE ANN. tit. 22, § 309 (2002); VT. STAT. ANN. tit. 24, § 4409(f) (2002).

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February 18, 2003

APPENDIX

THE *AMICI* ORGANIZATIONS

The American Association of People with Disabilities ("AAPD") is a national membership organization promoting the political and economic empowerment of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the ADA, AAPD has a strong interest in full enforcement and implementation of the ADA, including its application to States as covered entities.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professional and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

AARP is a nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by States and State entities, in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policymakers about the needs and capabilities of people who are blind, to assist individuals ad organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the

blind and sighted public. ACB was at the forefront of activity that led to the enactment of the ADA. Efforts to preserve the rights gained through that statute, and to strengthen its protections for blind people, continue through our legislative and advocacy activities aimed at increasing the accessibility of employment, information, public transportation, and programs of State and local governments. As a result, ACB is deeply concerned that these rights may be in jeopardy. Further, we are concerned that, if the ADA is weakened, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind, by State and local government entities. Therefore, we believe that efforts to preserve and vigorously enforce the ADA are of paramount importance.

The American Diabetes Association is the nation's leading nonprofit health organization providing diabetes research, information, and advocacy. Founded in 1940, the Association conducts programs in all 50 states and the District of Columbia, reaching more than 800 communities. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. To fulfill this mission, the Association funds research, publishes scientific findings, provides information and other services to people with diabetes, their families, health care professionals and the public, and advocates for scientific research and for the rights of people with diabetes.

The American Network of Community Options and Resources ("ANCOR") is a nonprofit association representing over 725 private providers offering community living, vocational, and employment supports nationwide to more than 360,000 individuals of all ages with mental retardation and other disabilities. For more than thirty-five years, ANCOR has advocated for the rights of individuals

with disabilities to receive the supports they need to live and work in the community. ANCOR is committed to ensuring effective state implementation of the Americans with Disabilities Act.

The American Occupational Therapy Association ("AOTA") is the national professional association of over 40,000 occupational therapists and occupational therapy assistants as well as students of the profession which promotes full participation in society and maximum achievement of human potential. AOTA advocates on behalf of the profession and the public, promoting health, well-being, productivity, and quality of life, through support of positive public policy such as that contained in the Americans with Disabilities Act. In addition, AOTA advocates for the full participation in society of all individuals, including the freedom of qualified individuals to practice health and other professions.

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection. In particular, ADL has supported Congress' broad authority under the Fourteenth Amendment enforcement power to remedy

constitutional deprivations caused by States, and Congress' authority to abrogate State sovereign immunity in cases of clear civil rights violations.

The Arc of the United States ("The Arc"), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and related disabilities and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, which have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Association on Higher Education And Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The Brain Injury Association of America is the only national nonprofit organization working on behalf of the more than 1.5 million Americans who sustain a brain injury each year and the estimated 5.3 million Americans who live with permanent disabilities resulting from a brain injury and their families. With its network of more than 42 Chartered State Affiliates and hundreds of local chapters and support groups across the country, the Association's mission is to create a better future through brain injury prevention, research, education, and advocacy.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national non-profit public interest organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact

litigation, education, and public policy work. Founded in 1973, Lambda Legal is the oldest and largest legal organization addressing these concerns. Since 1983, when it filed the nation's first AIDS discrimination case, Lambda Legal has appeared as counsel or *amicus curiae* in scores of cases in State and federal courts on behalf of people living with HIV or with other disabilities.

The National Alliance for the Mentally Ill (NAMI) is the nation's largest grassroots organization dedicated to improving the lives of people with severe mental illnesses. NAMI has more than 220,000 members and 1,200 state and local affiliates in all 50 states, the District of Columbia, Puerto Rico and Canada. Since its creation in 1979, NAMI's members have worked extensively on a national basis to combat pervasive stigma and discrimination against persons with severe mental illnesses that impose barriers to recovery and prevent these individuals from enjoying fundamental rights accorded all other American citizens.

The National Association for Rights Protection and Advocacy ("NARPA") includes recipients of mental health and developmental disabilities services; lay, professional, and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally disabled.

For over thirty years, the National Health Law Program ("NheLP") has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NheLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NheLP has worked with the ADA, and the program's work and our clients will be significantly affected by the Court's decision in this case.

Established in 1909, the National Mental Health Association, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research, and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity, and the opportunity to achieve their full potential free from stigma and prejudice.

National Senior Citizens Law Center ("NSCLC") is a non-profit public interest law firm which has acted as advocate for senior citizens and persons with disabilities for over 30 years. Because senior citizens have the highest incidence of disability in the general population, enforcement of laws protecting persons with disabilities is of particular concern to NSCLC and to the persons it represents.

The National Spinal Cord Injury Association is the nation's oldest and largest civilian organization dedicated to helping the hundreds of thousands of Americans coping with the results of spinal cord injury and disease. Our mission is to enable people with spinal cord injuries and diseases to achieve their highest level of independence, health, and personal fulfillment by providing resources, services, and peer support. The Americans with Disabilities Act is a critical tool in helping individuals achieve those goals.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The ADA is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome.

Self Help for Hard of Hearing People ("SHHH") is the nation's leading consumer organization representing people who are hard of hearing. SHHH's mission is to open the

world of communication for people with hearing loss through information, education, advocacy, and support. It is critical to retain protection from discrimination for the 28 million people with hearing loss in the U.S.

TASH is an international advocacy association of people with disabilities, their family members, other advocates, and people who work in the disability field, all working toward a society in which inclusion of *all* people in all aspects of society is the norm. TASH was established in 1975 and has 39 chapters throughout the USA and members from thirty-eight countries worldwide. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity, and quality of life. This mission is accomplished through individual, public policy, and legislative advocacy. TASH is committed to assuring social justice and equal access for all people with disabilities and to closing institutions and other segregated settings while concentrating efforts on ensuring that people have meaningful opportunities and homes of their own.

The Women and AIDS Clinic of Rutgers University School of Law, located in Newark, New Jersey, provides legal representation to individuals with, or affected by, HIV. Through both direct legal services and impact litigation, the clinic serves low income persons on a wide variety of issues, from housing to public benefits to denial of medical services and deprivation of the custody of their children. The Clinic is familiar with serious, persistent discriminatory treatment and policies imposed on persons with HIV, particularly those of limited resources, by government entities and officials.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES IMPOSING RESTRICTIONS ON JURY SERVICE*

ARK. CODE ANN. § 16-31-102 (1987):

Disqualifications.

(a) The following are disqualified to act as grand or petit jurors:

• • •

(2) *Mentally retarded* or *insane* persons;

• • •

(6) *Persons whose senses of hearing or seeing are substantially impaired*;

• • •

1994 Ark. Acts No. 4, § 6:

It is hereby found and determined by the General Assembly that Arkansas Code 16-31-102 disqualifies from acting as a juror any person who is mentally retarded or insane, and any person whose sense of hearing or seeing is substantially impaired; this act eliminates those disqualifications and in their place disqualifies from jury service persons who by reason of a physical or mental disability are unable to render jury services with the exception that no person may be disqualified solely on the basis of loss of hearing or sight; this modification to Arkansas Code 16-31-102 will bring Arkansas law into

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* Emphasis added throughout.

compliance with federal law; and this act should go into effect immediately in order to allow those persons to begin serving as grand or petit jurors as soon as possible. . . . .

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES EXCLUDING STUDENTS WITH DISABILITIES FROM PUBLIC EDUCATION

DEL. CONST. art. X, § 1 (1999):

Establishment and maintenance of free public schools; attendance.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, *not physically or mentally disabled*, shall attend the public school, unless educated by other means.

NON-CURRENT STATUTES CITED IN BRIEF AS EXAMPLES OF STATES RESTRICTING RIGHT TO MARRY AND FORM FAMILIES

IND. CODE § 22-1601 (1950):

Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of *insane, feeble-minded or epileptic* persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be *sexually sterilized*, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such

institution *afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness*: Provided, That such superintendent shall have first complied with the requirements of this act.

. . .

CAL. CIV. CODE § 4201 (1987):

License; necessity; contents; denial; under age applicants; forms; affidavit.

All persons about to be joined in marriage must first obtain a license therefor, from a county clerk, which license must show all of the following:

. . .

No license shall be granted when either of the parties, applicants therefore, is an *imbecile*, is *insane*, or is, at the time of making the application for the license, under the influence of any intoxicating liquor, or narcotic drug.

D.C. CODE ANN. § 30-103 (1981):

Marriages void from date of decree; age of consent.

The following marriages in said District shall be illegal, and shall be void from the time when their nullity shall be declared by decree, namely: (1) The marriage of an *idiot* or of a person *adjudged to be a lunatic*; . . .

. . .

IOWA CODE ANN. § 595.3 (West 1988):

License.

Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court. Such license must not be granted in any case:

. . .

5. Where either party is *mentally* ill or *retarded*, a *mental retardate*, or under *guardianship as an incompetent*.

MICH. COMP. LAWS § 551.6 (1990):

Mental or venereal disease; incapacity; validation of white-African marriages; penalty; competency of witness.

. . .

Section 6. No *insane person, idiot, or person who has been afflicted with syphilis or gonorrhea and has not been cured of the same, shall be capable of contracting marriage*. . . . No person who has been *confined in any public institution or asylum as a feeble-minded, imbecile or insane patient*, or *who has been adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction, shall be capable of contracting marriage* without, before the issuance by the county clerk of the license to marry, filing in the office of the county clerk a verified certificate from 2 regularly licensed physicians of this state that such person has been completely cured of such insanity, imbecility or feeble-mindedness and that there is no probability that such person will transmit any of such defects or disabilities to the issue of such marriage. *Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as feeble-minded, imbecile or insane patient, or who has been*

so adjudged insane, feeble-minded or an imbecile, except upon the filing of certificate as herein provided, with knowledge of the disability of such person, or who shall advise, aid, abet, cause, procure or assist in procuring any such marriage contrary to the provisions of this section, *is guilty of a felony* and on conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $1,000.00 or by imprisonment in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment.

MICH. COMP. LAWS § 552.1 (1990):

Invalidity of marriages; relationship of parties, bigamy, insanity, idiocy; legitimacy of issue.

Section 1. All marriages, which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a wife or husband then living, and all marriages solemnized when either of the parties was *insane* or an *idiot*, shall, if solemnized within this state, be absolutely void. The issue of such marriage shall be deemed legitimate.

. . .

MISS. CODE ANN. § 41-21-45 (1990):

Unlawful to cohabit with feeble-minded.

It *shall be unlawful for any person to cohabit with or attempt sexual intercourse with a female who is feebleminded*, as defined in section 41-19-101, after adjudication of such feeblemindedness.

Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars, or imprisonment of not less than

one year in the penitentiary, or by both such fine and imprisonment.

PA. STAT. ANN. tit. 48, § 1-5 (WEST 1965):

Restrictions on the issue of marriage license.

No license to marry shall be issued by any clerk of the orphans' court.

. . .

(e) If either of the applicants is or has been, within five years preceding the time of the application, *an inmate of an institution for weak-minded, insane,* or *persons of unsound mind*, unless a judge of the orphans' court shall decide that it is for the best interest of such applicant and the general public to issue the license, and shall authorize the clerk of the orphans' court to issue the license.

R.I. GEN. LAWS § 15-1-5 (1988):

Bigamous marriages void – marriage of lunatics and idiots.

Any marriage when either of the parties thereto, at the time of the marriage, has a former wife or husband living who has not been, by final decree, divorced from such party, and any marriage where either of the parties thereto is an *idiot* or a *lunatic* at the time of the marriage, shall be absolutely void, and no life estate created by chapter 25 of title 33 shall be assigned to any widow in consequence of the marriage, and the issue of the marriage shall be deemed illegitimate and subject to all the disabilities of illegitimate issue.

VT. STAT. ANN. tit. 15, § 512 (1990):

Voidable marriages – Grounds for annulment generally.

The marriage contract may be annulled when, at the time of marriage, either party had not attained the age of sixteen years or was an *idiot* or *lunatic* or *physically incapable of entering into the marriage state* or when the consent of either party was obtained by force or fraud.

VT. STAT. ANN. tit. 15, § 514 (1990):

Party an idiot or lunatic.

(a) When a marriage is sought to be annulled on the ground of the *idiocy* of one of the parties, it may be declared void on the complaint of a relative of such idiot at any time during the life of either of the parties.

(b) When a marriage is sought to be annulled on the ground of the *lunacy* of one of the parties, on the complaint of a relative of the lunatic, such marriage may be declared void during the continuance of such lunacy, or after the death of the lunatic in that condition and during the lifetime of the other party to the marriage.

(c) The marriage of a lunatic may be declared void upon the complaint of a lunatic after restoration to reason, but a decree of nullity shall not be pronounced if the parties freely cohabited as husband and wife after the lunatic was restored to sound mind.

(d) If an action is not prosecuted by a relative, the marriage of an idiot or a lunatic may be annulled during the lifetime of both the parties to the marriage, on the complaint of a person admitted by the court to prosecute as the next friend of such idiot or lunatic.

(e) The word "lunatic" as used in sections 511-514 of this title shall extend to persons of unsound mind other than idiots.

W. VA. CODE § 48-2-2 (1990):

For what and when marriages void; affirmation of annulment of marriage.

(a) The following marriages are voidable and shall be void from the time they are so declared by a judgment order of nullity:

. . .

(3) Marriages solemnized when either of the parties:

(A) Was an *insane person, idiot or imbecile*; ...